

No. 15695

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United States  
Court of Appeals  
for the Ninth Circuit

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ST. PAUL FIRE AND MARINE INSURANCE  
COMPANY, a Corporation,

Appellant,

vs.

HOMER CUNNINGHAM, JESS GULLETT and  
PERCY LAUDINGHAM,

Appellees.

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Transcript of Record

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Appeal from the United States District Court for the  
Northern District of California,  
Southern Division.

FILED

NOV 15 1957

PAUL P. ...



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF COUNSEL

JAMES P. SHOVLIN, JR., ESQ.,  
244 Kearny Street,  
San Francisco 8, California,  
For Appellant.

J. D. BURDICK, ESQ.,  
CARROLL, DAVIS & BURDICK,  
900 Balfour Building,  
San Francisco, California,  
For Appellees.





In the United States District Court for the Northern District of California, Southern Division

No. 35780

ST. PAUL FIRE AND MARINE INSURANCE  
COMPANY, a Corporation,

Plaintiff,

vs.

HOMER CUNNINGHAM, JESS GULLETT,  
PERCY LAUDINGHAM, FIDELITY AND  
CASUALTY COMPANY OF NEW YORK, a  
Corporation; FIRST DOE, SECOND DOE,  
THIRD DOE,

Defendants.

### COMPLAINT FOR DAMAGES

Comes now the plaintiff above named and complains of defendants, Homer Cunningham, Jesse Gullett and Percy Laudingham, and for cause of action alleges:

#### I.

That the St. Paul Fire and Marine Insurance Company was at all times herein mentioned and now is a corporation organized and existing under and by virtue of the laws of the State of Minnesota and was and now is a resident of said State; Fidelity and Casualty Company of New York was and now is a corporation organized and existing under and by virtue of the laws of the State of New York and was and now is a resident of said State; Homer

Cunningham, Jess Gullett and Percy Laudingham, were and now are residents of the State of California.

## II.

That the true name or capacities of the defendants sued herein under fictitious names, whether individual, associate, corporate or otherwise, are unknown to plaintiff, and in this respect and in these regards plaintiff prays leave to insert the true names of each of said defendants when determined, and to change them accordingly.

## III.

That plaintiff is informed and believes and upon such information and belief alleges that defendants First Doe, Second Doe, Third Doe are not now and were not at any time herein mentioned residents of the State of Minnesota.

## IV.

That at all times herein mentioned the aforesaid corporate defendant was doing business in the Northern District of California.

## V.

That on or about the 9th day of March, 1951, Homer Cunningham, Jess Gullett and Percy Laudingham, and each of them, while acting within the course and scope of their employment by Ben Mast Lumber Company so negligently and carelessly used and loaded a truck owned by George Green, that as

a direct and proximate result of the combined and concurring negligence of the defendants, and each of them, Wilbur C. Rasmussen was killed.

## VI.

That on the 9th day of March, 1951, there was in full force and effect a written policy of public liability insurance issued by plaintiff to Ben Mast Lumber Company, which said policy extended coverage to Ben Mast Lumber Company for liability incurred by reason of the aforesaid negligence of Homer Cunningham, Jess Gullett, Percy Laudingham, and each of them.

## VII.

That on or about the 8th day of March, 1952, Laurretta R. Rasmussen, the widow of Wilbur C. Rasmussen, individually and as guardian, ad litem, of her two minor children, Judy Rose Rasmussen and Gary Roy Rasmussen, commenced suit in the Superior Court of the State of California, in and for the City and County of San Francisco, against the Ben Mast Lumber Company and its employees, alleging that Laurretta R. Rasmussen was the widow of Wilbur C. Rasmussen, deceased; and that Judy Rose Rasmussen and Gary Roy Rasmussen were the children of said Wilbur C. Rasmussen, deceased, and that Laurretta R. Rasmussen, Judy Rose Rasmussen and Gary Roy Rasmussen were the sole surviving heirs at law of Wilbur C. Rasmussen, deceased; that Wilbur C. Rasmussen, deceased, sus-

tained severe personal injuries from which he died on March 10, 1951, as a result of the negligence of the employees of the Ben Mast Lumber Company acting within the course and scope of their employment by the Ben Mast Lumber Company; that said action thereafter proceeded to trial and a judgment was entered in favor of the plaintiff and against the Ben Mast Lumber Company on June 29, 1955, in the sum of Seventy-five Thousand Dollars (\$75,000.00); that said sum was paid by plaintiff on behalf of the Ben Mast Lumber Company on August 17, 1956.

## VIII.

That plaintiff has necessarily incurred attorney's fees in the trial and defense of said action in the amount of Four Thousand Two Hundred Fifty Dollars (\$4,250.00) which is the reasonable value thereof; in addition thereto, plaintiff has been forced to expend the further sum of One Thousand Thirteen Dollars Sixty-two Cents (\$1,013.62) for legal costs and expenses.

And for a Further, Separate and Second Cause of Action, Plaintiff Complains of Defendant Fidelity and Casualty Company of New York, a Corporation, and for Cause of Action Alleges:

## I.

Plaintiff incorporates herein as though specifically set forth in full, all of the allegations contained in paragraphs I, II, III, IV, V, VI, VII.

## II.

That on the 9th day of March, 1951, there was in full force and effect a written policy of public liability insurance issued by defendant to George Green, which said policy extended coverage to Homer Cunningham, Jess Gullett, Percy Laudingham and the Ben Mast Lumber Company, and obligated said defendant to defend Homer Cunningham, Jess Gullett and Percy Laudingham and the Ben Mast Lumber Company against the suit instituted against them by Laurretta A. Rasmussen, individually as the widow of Wilbur C. Rasmussen, deceased, and as guardian ad litem of decedent's two minor children, Judy Rose Rasmussen and Gary Roy Rasmussen, and to pay any judgment thereon.

## III.

That prior to making payment, plaintiff made a written demand upon defendant to pay said judgment; costs and attorney's fees, but defendant wrongfully refused to pay.

Wherefore, plaintiff prays judgment against defendants and each of them as follows:

1. That plaintiff have judgment against the defendants and each of them in the sum of Seventy-five Thousand Dollars (\$75,000.00), together with attorney's fee in the sum of Four Thousand Two Hundred Fifty Dollars (\$4,250.00); and legal costs and expenses in the sum of One Thousand Thirteen Dollars and Sixty-two Cents (\$1,013.62).



2. Costs of suit.

3. For such other and further relief as to the Court may seem just and proper.

/s/ JAMES P. SHOVLIN, JR.,  
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed August 23, 1956.

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[Title of District Court and Cause.]

### MOTION TO DISMISS

To the Plaintiff, St. Paul Fire and Marine Insurance Company, a Corporation, and to James Shovlin, Its Attorney:

You and Each of You Will Please Take Notice that the undersigned will, on the 11th day of Feb., 1957, at 9:30 o'clock a.m. on the said day, at the courthouse of the above-entitled Court at Seventh and Mission Streets in the City and County of San Francisco, State of California, Department . . . . thereof, move the Court as follows:

To dismiss the first cause of action contained in plaintiff's complaint on file herein because said complaint fails to state a claim against these moving defendants upon which relief can be granted.

Said motion will be based upon this notice of mo-

tion and all of the papers and records on file herein and the points and authorities attached hereto.

/s/ J. D. BURDICK,

Attorney for Defendants Homer Cunningham, Jess Gullett, Percy Landingham.

[Endorsed]: Filed January 14, 1957.

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[Title of District Court and Cause.]

AFFIDAVIT OF J. D. BURDICK IN  
SUPPORT OF MOTION TO DISMISS

State of California,

City and County of San Francisco—ss.

J. D. Burdick, being first duly sworn, deposes and says that:

\* \* \*

Attached hereto, made a part hereof, and marked "Exhibit B" is a true, full and exact copy of the contract of insurance entered into between plaintiff, St. Paul Fire and Marine Insurance Company and the Ben Mast Lumber Company for the period January 27, 1951, to and including January 27, 1952, along with all of the endorsements attached to and made a part of that contract. This is the same contract referred to in paragraph VI of the first cause of action of plaintiff's complaint which

is, by paragraph I of the second cause of action, incorporated into the second cause of action.

\* \* \*

/s/ J. D. BURDICK.

## EXHIBIT B

10. Subrogation—In the event of any payment under this policy, the Company shall be subrogated to all the Insured's rights of recovery therefor against any person or organization and the Insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The Insured shall do nothing after loss to prejudice such rights.

\* \* \*

[Endorsed]: Filed January 14, 1957.

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[Title of District Court and Cause.]

## POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS TO DISMISS, MOTION TO STRIKE, AND MOTION FOR MORE DEFINITE STATEMENT

### A. Introduction

The complaint in this action contains two causes of action. The first cause of action is by the plaintiff



St. Paul Fire and Marine Insurance Company against three named individuals, who are Homer Cunningham, Jesse Gullett and Percy Laudingham. The general sense of that cause of action is that the named individuals were employed by the Ben Mast Lumber Company on or about the 9th day of March, 1951. That on or about that date these three individuals, while acting within the scope and course of their employment by the Ben Mast Lumber Company, so negligently and carelessly performed their duties as employees as to cause the death of one Wilbur C. Rasmussen. Wilbur C. Rasmussen was not employed by the Ben Mast Lumber Company. The action is apparently maintained by the plaintiff as the alleged subrogor of the Ben Mast Lumber Company.

The theory of the cause of action is that by reason of the negligence of these named individuals, the Ben Mast Lumber Company was sued by the widow of Rasmussen and was required to pay a \$75,000 judgment to her, and also incurred expenses by way of attorneys' fees and legal costs. As to this cause of action, the defendants seek a judgment upon the grounds that the action is barred by the applicable statute of limitations contained in the laws of the State of California.

\* \* \*

[Endorsed]: Filed January 14, 1957.

[Title of District Court and Cause.]

AFFIDAVIT OF JAMES P. SHOVLIN, JR.,  
IN OPPOSITION TO MOTION TO DIS-  
MISS, ETC.

State of California,

City and County of San Francisco—ss.

James P. Shovlin, Jr., being first duly sworn, deposes and says:

That he is the attorney for the plaintiff herein and makes this affidavit on its behalf; that the suit of Rasmussen's heirs, resulting in the judgment against Mast Lumber Co., plaintiff's insured, was based solely upon the complaint that, not Mast, but the employees of Mast, acting within the scope of their employment, "carelessly used, caused to be used, maintained, and operated \* \* \* log conveying equipment \* \* \* that by reason of such carelessness, recklessness and negligence \* \* \* a large log, being conveyed by said log conveying equipment, was caused to and did violently strike said \* \* \* Rasmussen."

That said complaint did not, in any wise, other than under the doctrine of respondeat superior, charge Mast or the Mast Lumber Co. with any negligence.

That none of the employees of Mast were served with process in said action or appeared therein as

parties defendant and the judgment therein was solely against Mast Lumber Co.

That plaintiff herein, under its policy issued to Mast, paid said judgment, with interest and costs, totalling \$80,263.62 on August 17, 1956.

\* \* \*

/s/ JAMES P. SHOVLIN, JR.

Subscribed and sworn to before me this 15th day of May, 1957.

[Seal]      /s/ RUTH E. LYHACK,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My Commission Expires May 31, 1960.

[Endorsed]: Filed May 16, 1957.

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[Title of District Court and Cause.]

### ORDER

Several motions are before this court. Plaintiff has moved to enter default judgments against the individual defendants in this action. Defendants have made the following motions: To dismiss the action against the individual defendants on the ground that the claim against these defendants is barred by the applicable statute of limitations; to dismiss the action against defendant Fidelity &

Casualty Company of New York on several alternative grounds; to strike certain allegations from the complaint; and a motion for a more definite statement.

The motion to dismiss the action as to the individual defendants is on the ground that the applicable statute of limitations is the one-year period for tort actions provided in Section 340(3) of the California Code of Civil Procedure. Considering the purpose of statutes of limitations, I hold that Section 340(3) is applicable here. See *Aetna Casualty & Insurance Company v. Pacific Gas & Electric Company, et al.*, 41 Cal. 2d 785 (1953). Accordingly, the motion to dismiss the action as to the individual defendants is granted.

\* \* \*

Dated: June 24th, 1957.

/s/ EDWARD P. MURPHY,  
United States District Judge.

[Endorsed]: Filed June 24, 1957.

In the United States District Court for the Northern District of California, Southern Division

No. 35,780

ST. PAUL FIRE AND MARINE INSURANCE  
COMPANY,

Plaintiff,

vs.

HOMER CUNNINGHAM, et al.,

Defendants.

JUDGMENT AND ORDER  
OF DISMISSAL

The motion of defendants Homer Cunningham, Jess Gullett and Percy Landingham came on regularly for hearing on the 16th day of May, 1957, plaintiff above named appearing by James P. Shovlin, Jr., its attorney, and defendants, Homer Cunningham, Jess Gullett and Percy Landingham, appearing by Carroll, Davis & Burdick, by J. D. Burdick, their attorneys, and evidence by affidavit having been received by the Court, the Court having been fully advised in the premises and having thereupon ordered submission of the said motion, and thereafter on the 24th day of June, 1957, the Court having made and entered its written order granting the motion of defendants Cunningham, Gullett and Landingham for dismissal,

The Court, finding and expressly determining that there is no just reason for delaying the entry of

final judgment of dismissal as to defendants Cunningham, Gullett and Landingham, hereby directs the Clerk of the above-entitled Court to enter judgment of dismissal in favor of defendants Cunningham, Gullett and Landingham.

Dated July 1st, 1957.

/s/ EDWARD P. MURPHY,  
United States District Judge.

It Is Hereby Ordered, Adjudged and Decreed that the above-entitled action be and the same is hereby dismissed as to defendants Cunningham, Gullett and Landingham.

/s/ C. W. CALBREATH,  
Clerk;

By /s/ MARGARET P. BLAIR,  
Deputy.

[Endorsed]: Filed July 1, 1957.

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[Title of District Court and Cause.]

NOTICE OF APPEAL TO UNITED STATES  
COURT OF APPEALS FOR THE NINTH  
CIRCUIT

Notice Is Hereby Given that St. Paul Fire and Marine Insurance Company, plaintiff above named, hereby appeals to the United States Court of Ap-



peals for the Ninth Circuit from the Judgment and Order of Dismissal entered in this action on July 1, 1957, as to defendants Homer Cunningham, Jess Gullett and Percy Landingham.

/s/ JAMES P. SHOVLIN, JR.,  
Attorney for Said Appellant.

[Endorsed]: Filed July 30, 1957.

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[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON THE APPEAL

Appellant states the following points upon which it intends to rely on the appeal herein:

I.

The order and judgment of dismissal as to the first cause of action against the individual defendants, respondents herein, is without foundation or basis in law or fact and is contrary to law.

(a) The order directing judgment of dismissal is based upon the erroneous view of the trial court, not sustainable by the pleadings, that said cause of action is one for damages for the negligent tort of said defendants and respondents, as obviously such action is not assignable and as said defendants admit in their points and authorities in support of

their motion, the cause of action is brought by plaintiff and appellant against said defendants and respondents under its right of subrogation as insurer of the employer of said defendants, said employer having been forced by judgment to pay, on August 17, 1956, the judgment against it, said judgment being rendered against said employer alone solely because of the alleged negligence of its said employees, the defendants and respondents herein, proximately causing the death of said Rasmussen, whose heirs recovered such judgment against said employer as the sole defendant in said wrongful death action only upon the theory of its liability under the doctrine of respondeat superior.

(b) That plaintiff under law as well as the terms of plaintiff's policy issued to said employer was subrogated to all the rights of said employer against said employee defendants for indemnity against loss of plaintiff's said insured, the employer of the defendants and respondents herein.

(c) That the trial court erroneously applied the one-year statute of limitations, Section 340(3), Code of Civil Procedure, to said cause of action, while the right of indemnity sought to be enforced by plaintiff as such subrogee of their employer for said employer's right of indemnity against loss, against the said employees, defendants and respondents herein, is governed by Section 339(1) of the California Code of Civil Procedure, which said cause of action did not accrue until plaintiff's sub-



rogor, said employer of said defendants, had paid the loss.

/s/ JAMES P. SHOVLIN, JR.,  
Attorney for Plaintiff and  
Appellant.

Certificate of Service by Mail attached.

[Endorsed]: Filed August 21, 1957.

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO  
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein, as designated by the Attorney for the Appellant:

Excerpt From Docket Entries.

Complaint.

Motion of Plaintiff for Production and Inspection of Records.

Motion of Defendants Homer Cunningham, Jess Gullett and Percy Laundingham to Dismiss.

Affidavit of J. D. Burdick in Support of Motion to Dismiss, etc.

Memo. of Defendants in Support of Motions to Dismiss, etc.

Affidavit of James P. Shovlin, Jr., in Opposition to Motion to Dismiss, etc.

Order of Court.

Judgment and Order of Dismissal.

Notice of Appeal.

Bond on Appeal.

Statement of Points Upon Which Appellant Intends to Rely on Appeal.

Appellant's Designation of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 27th day of August, 1957.

[Seal]

C. W. CALBREATH,  
Clerk;

By /s/ MARGARET P. BLAIR,  
Deputy Clerk.

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[Endorsed]: No. 15695. United States Court of Appeals for the Ninth Circuit. St. Paul Fire and Marine Insurance Company, a Corporation, Appellant, vs. Homer Cunningham, Jess Gullett and Percy Laudingham, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed August 27, 1957.

Docketed September 4, 1957.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.